No. 11,786

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KANAME FUJINO,

Appellant,

vs.

TOM C. CLARK, Attorney General of the United States,

Appellee.

On Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR KANAME FUJINO, APPELLANT.

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OPINION BELOW.

The opinion of the District Court is reported in 71 F. Supp. 1, and is found in the record on pages 49-62.

JURISDICTION.

The jurisdiction of the United States District Court for the Territory of Hawaii is founded upon Section 9(a) of the Trading With The Enemy Act, 50 U.S.C. Appendix, Section 9(a), and upon Section 86 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 as amended; 48 U.S.C. Section 642.

The jurisdiction of this court rests upon the Judicial Code, Section 128, amended; 28 U.S.C. Section 225, and upon Section 86 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 as amended; 48 U.S.C. 642.

Judgment was entered in the District Court on June 5, 1947 (R. 60) and notice of appeal was filed on August 30, 1947 (R. 444).

QUESTIONS PRESENTED.

(1) Can the property of a citizen of the United States which he received by deed of gift from his father (an enemy alien) on March 21, 1941, be seized by the Alien Property Custodian on the ground that the authority of the father's agent was not recorded, where the undisputed testimony shows that the agent did in fact have authority and the gift was regarded as complete and irrevocable by the parties to the transaction?

(2) Is a transfer of property colorable where there was no express or implied agreement between donor and donee that the latter would hold the property for the donor, nor any means whereby the donor could recover the property?

(3) Should the Trading With The Enemy Act be construed to require a citizen of the United States to prove more than that he is not an enemy or ally of an enemy in order to recover property seized by the Alien Property Custodian in which he has an interest?

CONSTITUTIONAL PROVISION, STATUTES AND ORDERS.

The pertinent provisions of the Constitution, federal and territorial statutes, and executive orders appear in the Appendix.

STATEMENT OF FACTS.

In 1935, appellant's father, Yotaro Fujino, a Japanese alien, owned as sole proprietor two businesses in Honolulu (the Oahu Junk Company, and the Oahu Lumber and Hardware Company), which were conducted on land which is the subject of this action (R. 71, 72, 120). He had three employees, Tsuda, Tsutsumi and Yamamoto. In 1935, Yotaro Fujino returned to Japan, leaving Tsuda and Tsutsumi his agents to run the buisness (R. 75). At this time he mentioned his desire to incorporate the businesses at some future time, and to give the real property to appellant Kaname Fujino, his son (R. 80, 418). Yotaro returned to Hawaii once more, in 1935, remaining about one month in the status of a merchant (R. 73). Since then he has resided in Japan and has never returned to the United States.

Yotaro Fujino had three children—two girls and appellant Kaname Fujino (R. 85). Kaname was born in Hawaii on February 23, 1919, and is a citizen of the United States (R. 142, 147). The two girls are citizens of the United States and are four and five years older than Kaname (R. 181). Kaname was expatriated from Japan in November 1939, by official

act of the Imperial Government so that his citizenship in the United States is exclusive (R. 147, Ex. J, R. 513). He visited Japan once when he was a child and attended school there for six years from 1934 to May, 1941, when he returned to Honolulu (R. 144).

The businesses of the Oahu Junk Company and the Oahu Lumber and Hardware Company were conducted by Tsuda and Tsutsumi, subject to written advices received from Yotaro Fujino. (R. 79). Yotaro wrote only in Japanese, and Yamamoto was the translator of his letters who conveyed his instructions to Tsuda and Tsutsumi (R. 75). Yamamoto was also Yotaro's trusted adviser, who was consulted by the attorneys in fact on matters of policy (R. 368).

In 1939, while Yamamoto was in Japan, Yotaro discussed with him the desirability of incorporating the companies and of conveying the land here in question to appellant by deed of gift. Again in 1940, Yotaro's attorney, Robert Murakami (a member of the Bar of Hawaii) was in Japan and the same subject was discussed (R. 418). Murakami told Yotaro that under the Japanese law neither appellant nor his sisters would inherit Yotaro's personalty in Hawaii since Kaname was expatriated and the girls had married (R. 85). He also pointed out the advantages of distributing property by *inter vivos* gift (R. 83). Yotaro decided that he would incorporate the businesses and distribute the stock to the children (R. 87). To prevent dissipation he decided to require his children to give him a promissory note for the purchase price of the stock (R. 87, 118). His attorney

advised him that he could then waive a part of the note in any year and enjoy a tax exemption. Yotaro declared that he did not desire to include the land (the subject of this case) as an asset of the corporation, but wanted to give this property to appellant outright (R. 88, 297).

In 1940, Yotaro instructed Yamamoto to proceed with the incorporation of the business and with the conveyance of the land to his son, the appellant. These instructions were read to Tsuda and Tsutsumi by Yamamoto (R. 264, 374). In November, 1940, the corporation was formed and thereafter the attorneys in fact, acting under the power of 1935, transferred all the assets of the Oahu Junk Company and the Oahu Lumber and Hardware Company (exclusive of the land here involved) to the corporation in consideration of the issuance of shares to members of the Fujino family and the assumption by the corporation of the business debts of Yotaro (R. 90-95). A power of attorney authorizing Tsuda and Tsutsumi to act for appellant was prepared and executed in Japan by appellant so that the attorneys in fact could receive the 200 shares issued to him and execute a note for $20,000 to Yotaro on appellant's behalf (R. 133).

At the time of the incorporation Yotaro owed the Bishop National Bank of Honolulu the sum of $20,000, which debt was assumed by the corporation (R. 95). However the bank had security for only $1500 of the above sum. It required an additional security interest in Yotaro's real estate, being unwilling to rely entirely on the credit of the corporation since the

latter did not obtain the real property in the sale (R. 98).

Some of Yotaro's real estate was held in his name as Yotaro Fujino, and other parcels were held under the name of Yootaro Fujino. Tsuda and Tsutsumi held two powers of attorney from Yotaro, dating back to 1935, one in each of the foregoing names. In order to clear up the confusion in names and the multiplicity of powers, Tsuda and Tsutsumi obtained a new power from Yotaro referring to the fact that he was also known as Yootaro. The purpose of the attorneys in fact in obtaining the new power was to execute the mortgage to the bank and the deed of gift subject to the mortgage to appellant (R. 95, 340). The record is clear that Yotaro knew of these plans and executed the power in the belief that he was conferring authority upon his agents to execute a deed of gift of his real property (R. 418-421). The power of attorney authorized the attorneys in fact to "sell, mortgage, hypothecate, pledge, lease and otherwise dispose of, and every way and manner deal with real property" (Ex. E, R. 480). The mortgage (Ex. G, R. 488) was executed and the deed to Kaname drawn in March, 1941 (Ex. H, R. 501). The deed was left at the bank to be picked up by appellant on his return to Hawaii. The bank also requested appellant's endorsement on Yotaro's note so that it would have his personal liability as security, as well as his real property (R. 156, 210, Ex. K, R. 514). In May 1941, appellant returned from Japan, endorsed the note at the bank and took delivery of his deed and had it recorded. He later returned it to the bank as mortgagee (R. 153).

In the spring of 1941, Yamamoto went to Japan, where he reported to Yotaro that his wishes with regard to the conveyance had been carried out (R. 420). Yamamoto died in Shanghai in August of 1941 (R. 396).

Immediately after December 7, 1941, Mrs. Yamamoto was frightened and burned all the Japanese documents, papers and books which Yamamoto had left at his home (R. 399). It was his custom to keep some correspondence there (R. 398) and presumably Yotaro's written instructions to Yamamoto to complete the conveyance to appellant were destroyed at this time (R. 265-268).

When appellant returned to Honolulu he attended the university and worked part time at the Oahu Junk Company, Limited (R. 184). In August, 1941, it was agreed that the corporation should pay appellant $300 per month rent and assume the taxes and repairs. This figure was suggested by Tsuda and Tsutsumi and accepted by appellant (R. 185, 189). Then the corporation paid Kaname $1800 for the first six months' rent, i.e., March through August, 1941 (R. 205).

From time to time Kaname helped out his sisters, who were in Hawaii, when they were in need of funds (R. 182, 213). In 1941, Oahu Junk Company, Limited, received instructions from Yotaro to make a wedding gift of $500 to Tsutsumi's younger brother (R. 226). Appellant made this gift from his own funds considering that it was a family obligation and that

he, as the man of the family in Hawaii, should make the family gift (R. 190).

In June, 1942, Yotaro owed back income taxes in the amount of $11,800. Tsuda and Tsutsumi attempted to obtain a license through Foreign Funds Control to obtain certain of Yotaro's assets in order to pay off this liability. The license was refused. Thereupon an arrangement was made whereby the Oahu Junk Company, Limited, would put up $3,800 and would lend another $8,000 to appellant, setting off as security the future $300 monthly rent payments (R. 276, 277). Tsuda and Tsutsumi, as attorneys in fact for Yotaro, credited appellant with an $8,000 payment on his $20,000 note, which Yotaro held for the purchase of the Oahu Junk Company, Limited, stock (R. 279). Other than such uses to which the rentals of the land were put, from which it may be said that Yotaro received some benefit, there is no evidence of any undertaking on the part of appellant to hold the land for Yotaro or to put the proceeds thereof to any particular use (R. 158, 184). Nor is there any evidence that appellant felt bound to give money to his adult sisters, to give a wedding present to a family friend, or to see that his alien father's taxes were paid, except by such duty as an adult son would normally feel to act as his parent would want him to act, so long as his own self interest did not dictate to the contrary (R. 190, 207, 218).

On these facts the Alien Property Custodian, in Vesting Order No. 2724, determined that appellant did not own the realty, that he held it for his father's

use and benefit, and that he (Kaname) was so controlled by his father as to be a national of Japan. The custodian, therefore, vested title to the property in himself.

SUMMARY OF ARGUMENT.

The District Court held that the power of attorney dated February 20, 1941 (Ex. E, R. 479) executed by Yotaro Fujino, gave no authority to his attorneys in fact, to make a gift to appellant and that unrecorded authority was ineffective as against the Alien Property Custodian, and therefore that appellant has no "interest, right or title" in the real property within the meaning of Section 9(a) of the Trading With The Enemy Act; that the land was held for the benefit of an enemy not holding a license within the meaning of Section 7(c) of the Act, and finally that appellant himself was "a national of a foreign country" within the meaning of Section 5(b) of the Act, and Executive Orders Nos. 8389 and 9095. Thus the District Court held that even if appellant was the legal owner of the land, nevertheless the seizure by the Alien Property Custodian was lawful, and appellant has no remedy in the courts.

The District Court erred in construing the Hawaiian recording act (Revised Laws of Hawaii, 1945, Sec. 12757) as protecting the Alien Property Custodian, and in finding that the Custodian acquires rights greater than those of the alien whose interest he seized. Since the deed of gift was (as between

donor, his agent, and donee) admittedly fully authorized, and was executed, delivered, accepted and recorded, the gift is irrevocable. The donor cannot recover the property and neither can the custodian as the successor in title of the donor's interest.

Thus, appellant had an interest in the land unless such legal interest was merely colorable. The court erred in finding that there was such a reservation of control by Yotaro Fujino as to render the transfer colorable and appellant's interest insufficient to support the action. The acts of a son observing natural amenities such as assisting his sisters and making a wedding present to a son of his father's friend do not constitute control of appellant so as to deprive him of his property lawfully acquired and held.

Finally, the court erred in finding that appellant, a citizen of the United States, was subject to such control by his alien father as to justify the Alien Property Custodian's determination that appellant himself was a national of Japan within the meaning of Section 5(b) of the Act. The District Court was clearly in error in placing upon appellant the burden of showing not only that he was an enemy or ally of an enemy within the meaning of Section 9(a) of the Act, but also that he was not a national of Japan as the term is used in Section 5(b) as construed by the Alien Property Custodian. The Trading With The Eenemy Act does not require such proof as a condition precedent to recovery and the District Court misconstrued the act. If so applied, to a citizen of the United States, the act is unconstitutional as authorizing the

seizure of private property without just compensation and a denial of due process of law guaranteed by the Fifth Amendment.

ARGUMENT.

I. APPELLANT HAS A "RIGHT, INTEREST OR TITLE" IN THE LAND.

A. The land was transferred to him by deed of gift executed by attorneys in fact having recorded authority to act.

It is undisputed that since 1935, Yotaro Fujino has considered making a gift of his real property in Hawaii to appellant; that it was discussed with his business advisor in 1939, and with his lawyer in 1940; that he wrote in 1940 telling his attorneys in fact to consummate the gift; and that he executed a new power of attorney in 1941, the object and purpose of which was to authorize his attorneys in fact to make the contemplated conveyance (Ex. E). The power of attorney was duly recorded. The sole question is whether the recorded power of attorney, properly construed, was sufficient to attain the object for which it was drafted. Applying the rules for the interpretation of written instruments,[1] did the authority contained in the power of February 20, 1941, include authority to make a gift of land?

The trial court answered the above question in the negative, applying the well established rule of inter-

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[1]Powers of attorney are interpreted in accordance with the rules governing the interpretation of writings generally. See 2 *Am. Jur.*, "Agency", Sec. 31; *Soders v. Armstrong,* 172 Okla. 50, 44 P. (2d) 868 (1935).

pretation that an agent asserting the power to give away an asset of his principal must show that such power has been expressly conferred (R. 56). Construing one of the operative phrases in the power, the court held that the term "otherwise dispose of" is limited by the specifications preceding it. Furthermore (said the court) this power, read as a whole, was authority to run a business, and a gift is not a business transaction. We contend that the court erred by failing to apply basic principles applicable for ascertaining the intent of a written instrument.

The significant and distinguishing fact here is that all the parties to the transaction agreed on the interpretation which should be given to the written power. They are unanimous in their testimony that the power in question was intended to grant authority to make the gift, and that the attorneys acted with their principal's knowledge and approval. Cases involving disputes between principal and agent, or principal and third persons are inapposite.[2] Such cases construe a written power strictly to protect a principal who has tried to protect himself by reducing his agent's authority to writing. Here principal and agent agree as to the extent of authority conferred, but the appellee and the court below take the position that they didn't say what they meant to say.

The standard of interpretation applicable to this document in the first instance is—

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[2]See *Kaaukai v. Anahu*, 30 Haw. 226 (1927); *Brown v. Laird*, 134 Ore. 150, 291 Pac. 352 (1930); and other authorities cited by the trial court (R. 56).

> the ordinary meaning of the writing to parties of the kind who contracted at the time and place where the contract was made, and with knowledge of such circumstances as surrounded its making.[3]

Exhibit E contains authority—

> to hold, sell, mortgage, hypothecate, pledge, lease, and otherwise dispose of, and in any and every way and manner deal with real property.

and also authority to—

> remise, release and quitclaim to all my estate, right, title and interest including any curtesy in any property of whatsoever kind and nature.

Would not a reasonable man, knowing of Yotaro's past statements concerning the disposition of his Hawaiian real estate, knowing that one of the purposes of the power was to enable Tsuda and Tsutsumi to execute a deed granting the land to appellant, would not such a man, knowing all the circumstances, be compelled to say that the power to deal "in any and every way and manner" with the real estate included the power to give it away? The purpose of interpretation is to give effect to the intention of the parties. So long as the language used permits, that construction should be adopted which supports instead of defeats the purposes of the instrument.[4]

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[3] *Williston on Contracts*, Sec. 607 (Rev'd ed. 1936).

[4] 2 *Am. Jur.*, "Agency", Sec. 31; see *Lathrop v. Wood*, 1 Haw. 121 (1852).

There is no rule of law requiring a principal seeking to grant his agent the power to make a gift to state that power in express and separate words. That rule is one of interpretation. And, like the rule of *ejusdem generis,* it is a secondary rule, not to be applied if the meaning of the writing is disclosed from the primary sources of information, i. e., from the words themselves and the circumstances surrounding its execution.[5] Again, it is clear that in the first instance the general words of authority in Exhibit E must be considered in the illuminating circumstances of its execution and purpose, unembarrassed by artificial rules of interpretation, which should only be applied when the writing as regarded by the above standard of interpretation is ambiguous. Thus it is that the authors of the American Law Institute can say—

> *Unless otherwise agreed,* authority to sell does not include authority to mortgage the subject matter, * * * (or) to make a gift of it * * *[6]

The power here includes authority not only to sell but also to otherwise dispose of realty and to deal with it in any and every way. Read in the light of the circumstances, it is too clear for argument that the parties have agreed that the powers so broadly expressed include the power to make a gift. That power has been recorded, so that even if the Alien Property

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[5] 3 *Williston on Contracts,* Sec. 609; see *H. Hackfeld & Company v. Grossman,* 13 Haw. 725 (1902).

[6] *Restatement,* Agency, Sec. 65, subs. (1), comment (a).

Custodian were a third person within the Hawaiian recording act[7] he would be bound by notice of the agent's authority to make a gift.

Even if the court were to find that the instrument here, viewed with all the circumstances and the object of the power in mind, does not clearly contain the power to make a gift, it is manifest that the words used may confer such a power and that the instrument is at least ambiguous as to whether the power is in fact granted. The trial court must have treated the writing itself as ambiguous because he found it necessary to advert to certain rules for interpretation which are not to be applied if the expressed written intention of the parties is clear. Applying the principle that the writing must be read as a whole, the court held that the power here was given for a business purpose and a gift is not a business transaction.

The powers given to Tsuda and Tsutsumi under Exhibit E are as broad as language could make them. Rather than a power to run the Oahu Junk Company's business, it is a power to act as the *alter ego* of Yotaro in Hawaii. Certainly this broadest of powers should not be held to limit wide grants of authority contained in it. On the other hand, the court ignored the circumstances in which the power was executed[8] and the purpose of the parties in the

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[7]Revised Laws, Hawaii, 1945, Sec. 12757.

[8]See 3 *Williston,* Sec. 618, wherein Professor Williston takes the position that these circumstances may always be shown as a primary rule of interpretation.

execution.[9] In addition, the court rendered the words "and otherwise dispose of, and in any and every way and manner deal with real property" nugatory by applying the rule of *ejusdem generis*. That rule is not one to defeat intention, but rather one to aid in determining intention. If it appears to have been the intention of the parties to include other things not *ejusdem generis* in general words, the courts give effect to that intention,[10] particularly where, as here, the words would otherwise be meaningless.[11]

Yotaro gave Tsuda and Tsutsumi the power to otherwise dispose of and in every and any manner deal with his real property, intending that they should be authorized to grant the land in question to Kaname. We submit that this language reasonably construed clearly carries out Yotaro's intention, or if ambiguous, that it should be interpreted to do so. The acts and declarations of the parties demonstrate that such was the interpretation given the power by the parties themselves. This interpretation should be adopted by the court.[12]

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[9]Ibid., Sec. 619.

[10]*Lindeke v. Associates Realty Co.*, 146 Fed. 630, 638 (1906); *Hoffman v. Eastern Wisconsin Ry. & Light Co.*, 34 Wis. 603, 115 N. W. 383 (1908); *Webb v. Missouri State Life Ins. Co.*, 134 Mo. App. 576, 115 S. W. 481 (1909).

[11]See *Webb v. Mo. St. Life Ins. Co.*, supra, at page 482; and see 3 *Williston*, Sec. 619, note 2.

[12]3 *Williston*, Sec. 623, and collection of cases in note 2 thereof.

B. Even if the power to convey by gift was not contained in the recorded power of attorney, the gift to appellant was valid against Yotaro Fujino and appellee.

Assuming, *arguendo,* that the trial court's interpretation of the recorded power of attorney (Exhibit E) was correct, he was nevertheless in error in finding that appellant has no interest in the land. Yotaro wanted his agents to transfer the land to his son. He expressed this desire to his attorney, and he wrote a letter to the Oahu Junk Company directing it. Unfortunately the translator of the letter is deceased and the letter was destroyed. But no evidence has been offered to contradict the fact. The court below recognized that there were "unrecorded, relayed directions by letter and cable" to the attorneys in fact (R. 57), but held that such instructions were ineffective as against a third party.

This raises two questions:

Is appellee a "third party" so as to be protected by the Hawaiian recording act?[13]

Does this act protect third parties who have not paid value?

We answer both questions in the negative. The Alien Property Custodian's interest is exactly that of the alien whose interest he vested. If the gift is irrevocable as between Yotaro and Kaname, it is likewise enforceable against the custodian. Furthermore,

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[13]Revised Laws, 1945, Sec. 12757 provides: "All * * * powers of attorney for the transfer of real property within the Territory shall be recorded in the Bureau of Conveyances, in default of which no such instrument shall be binding to the detriment of third parties and conclusive upon their rights and interests."

we contend that the Hawaiian recording act protects only purchasers for value and that the Alien Property Custodian does not fall within this category.

Yotaro authorized his agents in writing to convey the land to appellant. His donative intent was present and the land was delivered to and accepted by Kaname. Yotaro himself could not recover the land, because the gift was complete. Is the Alien Property Custodian in a better position?

Section 7(c) of the Trading With The Enemy Act[14] states that property belonging to or held for "an enemy or ally of an enemy not holding a license granted by the President * * * shall be conveyed * * * to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian". Disregarding for the moment the question whether appellant held the property for Yotaro even though he had legal title, the problem now under consideration is what did Yotaro have that the custodian could seize? He had no property interest in the land. He had no power to recover the property from Kaname. He had a power at most to convey to a third person for value, in which case the recording act would prevent appellant from asserting his title. That power is not property. By its exercise, Yotaro could under certain circumstances create greater rights in another than he himself had. The Trading With The Enemy Act contemplates the seizure of property which would aid the enemy in war if unseized. It requires the alien

[14]50 U.S.C. App. 7 (c).

to transfer property of that type to the custodian, and empowers the latter to seize the property in the event of failure or refusal to transfer. In other words, property passes from the alien to the custodian either voluntarily or involuntarily. But in this case nothing could be taken from Yotaro because he had nothing. The real property belonged to appellant, a United States citizen, and presumably could not be utilized to aid the Japanese in the war. If Yotaro exercised his power under the recording act to create a superior title in a third person who was an enemy, the custodian could force a transfer of that title from the enemy to himself. But, we submit, the custodian could not force Yotaro, who had nothing, to exercise his power to create a title in the custodian to defeat the existing title in appellant, a citizen of the United States.

There is one case which might indicate that the custodian's rights are broader than those of the enemy from whom he obtained them. In *Lizrodt v. Miller,*[15] an American debtor of any enemy sought to recover from the custodian the difference in dollar value of the amount of the debt in marks when the custodian enforced payment to him, and the date when the debt could have been legally paid after the end of the war, the mark having declined in value considerably by the latter date. The court recognized that the custodian "was substituted in Donner's (the alien's) place by the seizure", but held that it was necessary to the administration of the statute to allow the custodian to

[15]17 F. (2d) 533 (CCA 2d, 1927).

demand payment in dollars rather than marks, and that this was within the war powers of Congress. This decision is clearly sound. But it is noted that no rights of friendly third parties were involved. Nor does the case stand for the proposition that the custodian receives greater rights than the enemy whose property he seizes, except that he need not take performance in the country with which we are at war.

Where friendly persons assert an interest in the property, the courts have been careful to preserve their rights and to hold the custodian subject to the same liabilities as his predecessor in title. Thus an American partner of an enemy was entitled to assert an equitable lien on American partnership assets to see that they were applied to American debts, and to liquidate his partnership interest. Only the resultant enemy interest was allowed to be seized.[16] And where the custodian vests the interest of an enemy in securities held in trust, the capture was held not to change the character of the enemy's right. If the enemy was subject to the trustee's right of accounting, so also was the custodian.[17] And an agent claiming a lien against the property of his enemy principal may assert the lien against the custodian.[18] The above cases demonstrate that the custodian, instead of being in the position of a third party, stands in the shoes of the alien enemy and can assert no greater rights.

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[16]*Mayer v. Garvan*, 270 Fed. 229, mod. 278 Fed. 27 (1920).
[17]*Kahn v. Garvan*, 263 Fed. 909 (1920).
[18]*Standard Oil Co. of N. J. v. Markham*, 64 F. Supp. 656 (1945).

An even stronger case conclusively shows that the custodian is bound by the enemy's title and cannot assert greater rights to the detriment of friendly persons. A citizen of the United States declared a trust in favor of an enemy. The custodian seized the property. The enemy did not learn of the trust until after the war, whereupon he renounced the gift. The court held that the renunciation could defeat seizure.[19] There the enemy had the power to make the property his own. But the court refused to allow the custodian to treat this power as equivalent to ownership for purposes of seizure, where renunciation would give the property to a friendly person. Here, Yotaro may have had the power to create title in another. But as to him, appellant's title was supreme. The court should not do a United States citizen out of his property by allowing the custodian to treat Yotaro's power unexercisable during the war, as a sufficient basis for seizure of the property.

The next question as to the effect of the Hawaiian recording act on the gift transaction here is whether the custodian is a "third party" within the meaning of the statute, even though this court were to hold that the custodian is not bound to assert only the rights of the enemy whose property he purported to seize. It has been held under the Hawaiian statute that the marshal, as attaching officer, is a mere stranger and not a "third party" so as to be protected against unrecorded chattel mortgages. Thus, in *Wright v. Brown*[20] a mortgagee under an unrecorded

[19] *Stoehr v. Miller*, 296 Fed. 414 (1923).
[20] 11 Haw. 401 (1898).

chattel mortgage was allowed to replevy the mortgaged property from the marshal, who had attached the property at the instance of a creditor of the mortgagor. The court said that plaintiff's title was not void and that the statute, being designed to protect persons who had "rights" or "interests" in the property, did not protect a "mere stranger" such as the marshal.

On the other hand, in *Holmes v. Serrao*[21] it was held that the conveyance of land by an agent acting under an unrecorded power of attorney did not bind a person who purchased the land on execution sale, even though the purchaser had actual knowledge of the outstanding power. The decision rested on the ground that actual knowledge was not equivalent to recording. We have no argument against this holding. The problem here is whether the *Holmes* or the *Wright* case more closely resembles the case at bar. The plaintiff in the *Holmes* case had paid value for the land. There was no question that the recognition of the prior unrecorded deed executed by an agent acting under an unrecorded power would be to his "detriment". But the marshal in the *Wright* case had paid nothing for his interest as the attaching officer. Enforcement of the mortgage, said the court, would not be to his detriment. The attachment was made according to law, and gave the marshal such interest as the mortgagor had, but for the unrecorded mortgage. If the mortgage were ineffective he could certainly maintain his title against the mortgagee, just

[21] 18 Haw. 25 (1906).

as here, if the gift is deemed invalid, the custodian may maintain his title against appellant. But the Supreme Court of Hawaii has held that one in such a position has not been injured by the unrecorded transaction, and is not a "third party" within the meaning of the statute. The custodian's position is far more analogous to an attaching officer than it is to a purchaser for value. The analogy is not new. In *Kohn v. Kohn*[22] Judge Learned Hand drew an analogy between garnishment and attachment on the one hand, and alien property custodianship on the other. The Alien Property Custodian, having put up no value, will suffer no detriment by being forced to recognize the unrecorded authority of Tsuda and Tsutsumi to make the conveyance here in question to Kaname.

We express no opinion whether the recording of the deed to Kaname would cure the invalidity of an unrecorded power. The failure to place the transaction on public record, upon which the decision in the *Holmes* case was based, was not here present.

C. Yotaro Fujino did not exercise such control over the property as to render the conveyance to appellant a sham.

In the remainder of this brief we assume that appellant had legal title, either because the recorded power of attorney contained authority for the agents to make the conveyance, or because the custodian has no standing to claim the protection of the recording act.

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[22]264 Fed. 253 (1920).

The District Court held that the land was "property 'owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy' (Yotaro Fujino) not holding a license within the meaning of Section 7(c) of the Act" (R. 59) and that it was " 'owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control * * * by an enemy country or national thereof' (Yotaro Fujino—Japan) within the meaning of Section 5(b) of the Act and Executive Orders Nos. 8389 and 9095, as amended."

There is no evidence that the gift to appellant was subject to an understanding that the property would at any time be returned to Yotaro. Nor is there anything in the nature of a gift transaction which requires it to be regarded as a colorable transaction.[23] That the transfer was made in contemplation of war does not place a higher duty on appellant to show that it was nevertheless bona fide and irrevocable.[24] Indeed, even the fact that the transaction gave rise to considerable suspicion of fraud is no basis for challenging uncontradicted testimony.[25] In *Miller v. Herzfeld*[26] the only evidence of a gift was the radiogram "Transfer Account Felix," referring to the alien's brokerage account, and the alien's testimony after the

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[23]*Corn Exchange Bank v. Miller,* 15 F. (2d) 456 (1926); *Miller v. Herzfeld,* 4 F. (2d) 355 (1925).

[24]*Standard Oil Co. of N. J. v. Markham,* 64 F. Supp. 656 (1945).

[25]*Becker v. Miller,* 7 F. (2d) 293 (1925); *Miller v. Herzfeld,* supra.

[26]Ibid.

war that he intended to make a gift of the account to his brother, Felix. The radiogram was sent in the period between termination of diplomatic relations and the declaration of war. Nevertheless the court held that there was a completed gift and the donee could recover.

The District Court indicates that one reason why the land was subject to seizure was because appellant knew nothing of its value and did not exercise complete dominion over it (R. 58). The *Herzfeld* case is significant on this point because there the friendly donee knew nothing about the gift, did not accept it, and reported the property to the Alien Property Custodian as enemy property. Nonetheless, when the war was over and he learned that a gift was intended, he was allowed to sue for the return of the property, and Section 7(c) of the act was not found to stand in his way.[27]

It is clear then that neither the nature of the transaction as a gift nor the circumstances of its execution, nor the unfamiliarity of appellant with the land, will render the transaction colorable and the seizure valid as far as Section 7(c) of the Trading With The Enemy Act is concerned. The cases under that section, arising out of the first World War, required either that the transaction be incomplete or that the enemy and the friend have agreed that the latter would hold the property for the benefit of the former,

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[27]Cf. *Stoehr v. Miller*, 296 Fed. 414 (1923).

before a court would hold that the property was "belonging to or held for" an enemy.[28]

In 1941, the Trading With The Enemy Act was amended to include the new Section 5(b).[29] The chief change wrought by this section was to allow the seizure of property owned or controlled by foreign nationals, as distinct from enemies.[30] Acting under this section the President, by Executive Order,[31] authorized the Alien Property Custodian to vest—

> Any other property or interest within the United States of any nature whatsoever owned or controlled by * * * a designated enemy country or national thereof.[32]

Section 10 (a) of the order states that the term "national" shall have the meaning prescribed in Section 5 of Executive Order No. 8389, as amended.[33] "National" is there defined to include—

> any person to the extent that such person is, or has been * * * acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country.[34]

A comparison of the property subject to seizure under Section 2 (c) of Executive Order No. 9095 and

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[28]Cf. *Corn Exchange Bank v. Miller,* supra, and *Miller v. Herzfeld,* supra, with *Lust v. Miller,* 4 F. (2d) 293 (1923), and *Ebert v. Miller,* 4 F. (2d) 296 (1925).

[29]50 U.S.C. App. 5(b).

[30]See *Clark v. Uebersee Finanz-Korporation,* 332 U. S. 480 (1947).

[31]Executive Order No. 9095, as amended by Executive Order No. 9567, 10 F.R. 6917, 50 U.S.C. App. Sec. 6, note.

[32]Ibid., Sec. 2(c).

[33]5 F.R. 1400; last amendment, Executive Order No. 8998, 6 F.R. 6787, 12 U.S.C. 95(a), note.

[34]Section 5, E(iii).

that for which seizure is authorized by Section 7 (c) of the Trading With The Enemy Act reveals that the executive order adds one new characteristic not contained in Section 7 (c); that is the matter of "control" by a national of a designated enemy country, as distinct from being held for, on account of, or for the benefit of, an enemy.

We have illustrated how Section 7 (c) was applied to cases similar to the present one arising after the first World War. It is clear that there is nothing in the facts here which justifies a finding that the land in question was held by appellant for the benefit of his father.

Was the land controlled by Yotaro? This seems to be the foundation of the District Court's conclusion. Thus he says:

> By controlling the plaintiff as a son and an only son, and controlling him directly as to his use of his shares of stock, Yotaro Fujino indirectly but effectively, silently controlled plaintiff's use and disposition of the land * * * Yotaro Fujino in point of fact controlled the plaintiff, thereby retaining the control, beneficial use, and enjoyment of the land in question. (R. 58.)

Here then, is the crux of the case. If Yotaro so controlled this land as to make the transfer to his son colorable, then perhaps the District Court was right in holding that appellant had no "interest, right or title" in the property. As the weight of the evidence of this control is discussed, it should be borne in mind that appellant is a United States citizen, that the land in question is located in American territory,

that Yotaro was at all times in Japan, and that there is no evidence of any agreement between father and son that the latter would use the land or its fruits only as directed by Yotaro. The situation then is this:

Appellant is given land, a large part of which is occupied by a business of which members of his family are stockholders. Let us even assume that the Alien Property Custodian was right in holding that the business was owned or controlled by Yotaro. The fact that space is necessary to the doing of business and that appellant owned the space occupied by this business, does not support an inference that in owning the land he was controlled by the owner of the business. The relationship of landlord and tenant is too well understood in our law to deduce that a landlord is controlled by his tenant because the tenant needs his land. Nor is it significant as showing Yotaro's control, that appellant did not drive a hard bargain in obtaining rent from the corporation for the land. As a matter of common sense, it would be most unusual and unnatural to find the recipient of a gift of $300 a month immediately using the power flowing from the gift to force the donor to increase the muniments thereof, particularly where donor and donee are father and son. Nor is it strange or indicative of retained control that Kaname, a schoolboy, should allow his trusted family friends (officers of the corporation) to suggest a reasonable rental for the premises. The fact remains that he was paid rent and that the rental proceeds were given him without any strings attached.

The District Court treats the transaction as a family arrangement and uses the analogy of cases holding that the income of a trust will be taxed to the settlor where he has given it away but retained such control over it as to in effect amount to a certain degree of ownership.[35] Of course, under no conceivable extension of the *Clifford* doctrine would the income from this land be taxable to Yotaro. And the tax cases rest entirely on the acknowledged and formalized reservation of degrees of control by the settlor. Here we have neither open nor hidden agreements granting Yotaro the power to control the disposition of the land. Thus, according to the District Court, the power to destroy by confiscation is to be used more readily and with less safeguards than the power to tax. It has never been doubted that the beneficiary of a *Clifford* trust is the legal owner of the income even though the settlor is taxed.

The court found that Kaname used the income from the land to take care of Yotaro's family obligations. This refers to the small gifts of money which appellant made to his adult sisters, to the wedding gift which he gave to a family friend, knowing that his father wanted a gift made, and to the United States tax liability of Yotaro which Oahu Junk Company and appellant paid. Let us consider a hypothetical case:

Suppose Yotaro had given this land outright to appellant in 1941 and after the gift was complete,

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[35]*Helvering v. Clifford,* 309 U. S. 331 (1940); *Losh v. Comm'r,* 145 F. (2d) 456 (1944); *Comm'r v. Buck,* 120 F. (2d) 775 (1941).

had said, "Kaname, I shall be in Japan and I'd like to know that everything is going all right with the family. If you see your sisters in need, you'll give them some money, won't you?" And Kaname said he would. If, thereafter, Kaname gave small amounts to his married sisters would that fact be proof that the subject of the gift to Kaname was so controlled by Yotaro as to be in effect an enemy asset? Kaname's sisters are also American citizens. The property is not being put to enemy use. We submit that such an inference is preposterous. And here, Yotaro did not even use such precatory language at the time he made the gift; much less did he demand that appellant agree to devote the proceeds of the land to Yotaro's purposes as a condition of the gift.

Even less does the wedding gift to an employee of Oahu Junk Company indicate that Yotaro controlled the proceeds of the land. In September 1941, Yotaro cabled the company to make a gift of $500 to an employee of the company—a family friend and brother of one of the corporation's managers. The corporation was not in a posititon to give this generous wedding gift because of Treasury freeze regulations. Appellant being financially able to make the gift, did so in order to carry out his father's desire and meet his family's social obligation. There is not one scintilla of evidence that appellant was forced to make this gift or that Yotaro had the desire or ability to force him to do so. That two wills happen to coincide in desiring a particular objective does not support an inference that one is subservient to the other.

Moreover, the question being investigated now is not the extent of control exercised over Kaname by Yotaro (which seems to underlie the lower court's decision) but the control retained by Yotaro over the asset itself—the land seized by the custodian. That this is a very real distinction in the administration of this statute will appear hereafter. For the present it suffices to point out to the court that the evidence clearly shows that appellant and he alone, exercised dominion over the bank account wherein the rent from the land was deposited, and that it was appellant—not his father or his father's agent—who distributed the money to his sisters and the wedding gift to the family friend.

The one final element of control suggested by the lower court was the payment of Yotaro's tax liability by Kaname in conjunction with the Oahu Junk Company, Limited. Let us say first that we fail to understand how the payment of an enemy's tax liability, to avoid the penalties and forfeitures to which delinquent taxpayers are subject, can in any way render the source of the funds an enemy asset. The payment was made during the war. The land was situated in Hawaii, far removed from enemy influence and control, and incapable of being used in furtherance of the Japanese war effort.[36]

Appellant owed his father $20,000 for the purchase of the stock. Yotaro had an existing tax liability of $11,000, which his agents desired to pay. The funds of the Oahu Junk Company, Limited, were frozen.

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[36]See *Corn Exchange Bank v. Miller*, 15 F. (2d) 456.

Tsuda and Tsutsumi therefore suggested to Kaname that he borrow $8,000 from the Oahu Junk Company, Limited, securing the loan by the rental payments of $300 per month due him from the company, which payments would be set off against the $8,000 liability. This transaction was arranged primarily to satisfy Foreign Funds Control, who would not otherwise release the funds of Oahu Junk Company, Limited, which were already frozen. But Kaname did not merely donate this $8,000 to his father. The $8,000 was credited against his $20,000 obligation to Yotaro, reducing it to $12,000 and increasing his equity in the shares pledged. Now it is true that the custodian has vested these shares as being controlled by Yotaro because Yotaro admittedly took notes from the distributees. The issue of whether the custodian could retain the equity of appellant and his sisters, American citizens, over and above the acknowledged enemy interest in the shares, has never been tried. But if appellant has a recoverable interest in the shares, it was substantially increased by the $8,000 reduction of his liability. In other words, this was a transaction in which appellant received value for his advance.

We submit that the control "by a designated enemy country or national thereof" required by Executive Order No. 9095,[37] before the custodian has authority to vest the asset means actual dominion by the enemy national involved so that he would or might be able to make use of the asset against the interests of the United States. If the enemy national concerned is

[37]Section 2(c), 10 F.R. 6917; 50 U.S.C. App. Sec. 6, note.

Yotaro Fujino (R. 59) there is no evidence of any exercise of dominion over the land or the rentals from it. Appellant had complete control over the fruits of this land. He established the bank account. When money was withdrawn he withdrew it. Control of the asset rested with him. It is merely confusing the issue and making a clear analysis difficult to hold that Yotaro controlled the land so as to make it subject to seizure.

There is no evidence that appellant was holding the land for Yotaro, so that the latter could or would get it back later or that he agreed to use the land for the benefit of his father. Incidental benefits of a social nature will not support an inference that appellant was committed to a course of devoting the land and its proceeds to the benefit of his father. Thus, seizure cannot be justified under Section 7 (c) of the Trading With The Enemy Act. And as we have shown above, there is no evidence that Yotaro controlled the land so as to make it subject to seizure under Section 5 (b) of the act and Section 2 (c) of Executive Order No. 9095. The chief justification relied upon by the custodian in his vesting order[38] is that appellant himself was acting for the benefit of or in behalf of Yotaro and was therefore a national of a designated enemy country within the meaning of Section 10 of Executive Order No. 9095, as amended. Therefore property owned or controlled by him could be seized under the authority of Section 5 (b) of the act and executive orders issued thereunder. In other words, the issue now under discussion comes to this:

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[38]Vesting Order Number 2724, finding 2 (R. 13 and pp. 15-16).

Assuming a valid and non-colorable transfer of the land to appellant who became the owner and person in control of the property, was appellant properly determined to be a "national of a designated enemy country" so as to render his property subject to seizure? Did he act in behalf of or under the control of his father, Yotaro Fujino?

II. APPELLANT IS NOT A "NATIONAL OF A DESIGNATED ENEMY COUNTRY".

In determining that appellant was a national of Japan so as to vest title to this land, the custodian found that he was "acting or purporting to act directly or indirectly for the benefit or on behalf of" Yotaro,[39] and that the national interest required that he be treated as a national of Japan.[40] The lower court sustained these findings, saying that Kaname was "a national of a foreign country within the meaning of Section 5 (b) of the act and Executive Orders Nos. 8389 and 9095, both as amended, in that he acted in behalf of or under the control of" Yotaro. (R. 59.) And the court found control in that if appellant acted contrary to his father's wishes, he might "incur his father's displeasure and be read out of the family and out of the corporation". (R. 58.) Here then is the situation as the trial court would have it: A dutiful son, the recipient of a generous gift from his

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[39]Section 5, E(iii), Executive Order No. 8389, 5 F.R. 1400, as amended; 12 U.S.C. Sec. 95(a), note.

[40]Section 10(a) (iii), Executive Order No. 9095, as amended, 10 F.R. 6917; 50 U.S.C. App. Sec. 6, note.

father, who gives certain income from the subject of the gift to members of his family and to his friends, finds himself dubbed and treated as an enemy when war is declared between his father's homeland and his own. Such an illogical conclusion leading to harsh administration should be avoided if the purposes of the Trading With The Enemy Act can nevertheless be attained. The policy of the act is—

> that in time of war the Government shall have the right to seize and sequester all property openly or secretly held in this country for the account of one who owes allegiance to and dwells within the territory of this country's enemies * * *. It is a policy designed to cripple the enemy's commerce, to capture his property and to decrease his capacity for prolonging hostilities through the use of private resources.[41]

Regarded in the light of the policy as thus articulated, parental control of the type stated by the District Court could not hinder the aims of the act. Nor could the uses to which appellant put his property, which might have conferred a sentimental benefit on Yotaro, be such as could increase the enemy's capacity to wage war. Assuming that war did not sever the ties of filial love, what control could be exercised over appellant by threats of being written out of the family when that had already occurred by his expatriation. In peacetime, appellant gave gifts to sisters and to a friend, which presumably made Yotaro happy. Such peaceful activities certainly had no bearing on Japan's capacity to wage war. When the world was at

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[41] *Standard Oil Co. of N. J. v. Markham,* 64 F. Supp. 656, 665 (1945).

peace, the normal expectation of everyone would be that a son should carry out his father's desires so long as they are not inconsistent with his own welfare. And every son is subject to the same sort of control by parental disapproval and inheritance in varying degrees.

Must every loyal United States citizen son of an alien father be damned as an alien national during war merely because he recognized, in peacetime, familial ties? This act is one of protection of the nation, not a bill of attainder wreaking vengeance upon the blood of our enemies found in our midst. We must look for the control of a citizen by an enemy during the war. If such exists, then it will be in the national interest to treat the controlled citizen as an enemy national. Relationships of principal and agent, master and servant, landlord and tenant, parent and child, existing between friend and enemy before they became such, are too often innocent to be indiscriminately cut with a Herodian sweep of the custodian's power. There is no evidence here of any agreement whereby appellant agreed to hold the property for Yotaro, or to devote it to Yotaro's purposes, or to stand ready to comply with Yotaro's orders in time of war. There are only the parent-son, pledgee-pledgor, tenant-landlord relationships, none of which carried over to an exercise of control over Kaname during the war. Except for ties of blood, these relationships are probably terminated by the war.[42] The

[42]Cf. *Mayer v. Garvan,* 270 F. 229, mod. 278 F. 27 (1920)—(partnership terminated).

payment of Yotaro's taxes during the war, for value, without communication with Yotaro, not only rendered *quid pro quo* to Kaname, but increased the capacity of the United States to wage war.

Again we have attempted to show that the few uses to which appellant applied the rents (which are said to inure to Yotaro's benefit and to show his control) do not in fact support an inference that appellant was acting for and on behalf of his father with regard to this land. There is no evidence of retention of control other than the fact that Kaname was Yotaro's son. Whatever control may exist by virtue of that relationship alone was not within the contemplation of the statute nor was it operative during the war.

There is only one other case in the books wherein a court has sustained the custodian's finding that an American citizen is a national of an enemy country so that his property could be seized. That case is *Draeger Shipping Company v. Crowley.*[43] That this judgment of treason or near treason and summary punishment should be charily passed against American citizens is indicated by the facts and opinion of that case. Draeger Shipping Company, an American corporation, and Frederick Draeger, an American citizen, made a contract with Shenker and Company, Inc., a New York corporation solely owned by a German holding company, resulting in an internal merger of their corporations. Thereafter, their business was

[43]55 F. Supp. 906 (1944).

conducted as a joint venture under the management of Mr. Draeger. The evidence was clear, despite attempts at concealment, that Draeger Shipping Company was carrying on the business of Shenker and Company. Naturally, this business was of considerable value and benefit to Shenker and Company its parent corporation. Obviously Draeger had attempted to cloak the fact that his business was that of the German company. The evidence was clear that Draeger received his instructions concerning the management of the business from Berlin. The case was manifestly one for the exercise of powers under Section 5 (b) of the act. And its facts are in no wise comparable to the facts in the case at bar. We submit that the scant facts shown in the instant case of incidental benefit to Yotaro from the income of the land, and the fact that some of Kaname's actions probably pleased his father and were in accordance with the latter's desire, show neither control of Kaname by Yotaro nor an understanding by Kaname that he would be so controlled. And we emphasize again that there is no other evidence of retention of control such as the contract in the *Draeger* case. In the absence of such evidence, the court below was in error in upholding the custodian's finding that appellant was a national of Japan within the meaning of Section 5 (b) of the act and executive orders issued thereunder.

III. EVEN IF APPELLANT WERE HELD TO BE A NATIONAL OF JAPAN UNDER SECTION 5(b) OF THE ACT, HE COULD STILL RECOVER HIS PROPERTY IN THIS ACTION.

For the purposes of this argument, we assume once again that the gift to Kaname was valid and enforceable, and that there is no evidence that the transfer was only colorable. The fact of "control" either of Kaname or of the property would not alter the fact that he had an "interest, right, or title" unless control were such as to render the transfer just a sham transaction. He therefore is entitled to sue for the recovery of the land provided he meets the other requisites of the government's consent to sue, as contained in Section 9 (a) of the act. The only other qualification a claimant must meet is that he not be "an enemy or ally of enemy". Since he is an American citizen appellant satisfies this qualification also, except in so far as the question is affected by the custodian's determination that he is a "national of a designated enemy country" and the trial court's finding in support of that determination.

Assuming this finding to be correct, is appellant therefore barred in this case? The trial court seemed to think so, for it placed the burden on appellant to show not only that he had an interest in the property but also that he did not fall within the various categories of Section 5 (b). The Supreme Court of the United States has recently answered the question authoritatively and its decision is that appellant may nevertheless recover his property now that the war is over, and the enemy can gain no benefit therefrom.

The question is a nice one of construction of a jumbled statute. The Trading With The Enemy Act[44] was passed in 1917, allowing the Alien Property Custodian to seize property held for "an enemy or ally of enemy." Logically, then, Congress granted persons who had an interest in the property seized, and who were not enemies or allies of an enemy the right to sue to recover their property.[45] On December 18, 1941, the First War Powers Act was passed, Title III of which amended Section 5 (b) of the former act. The amendment allowed the Alien Property Custodian to seize "any property or interest of any foreign country or national thereof."[46] But Section 9 (a) regarding the right to sue for recovery was not amended. Therefore it was questionable whether a "national of a foreign country" whose property was seized by the custodian, and rightfully seized, could nevertheless recover his property, since he was not an "enemy or ally of enemy." Two other courts, in addition to the court below, held that Section 5 (b) impliedly amended Section 9 (a) so that a person whose property was seized had to prove not only that he was not an enemy or ally of an enemy but also that the seizure was unauthorized by Section 5 (b) or the executive orders thereunder before he could bring his action under Section 9 (a).[47] On the other hand, in *Uebersee*

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[44]50 U.S.C. App. Sec. 1 et seq.

[45]Section 9(a); 50 U.S.C. App. Sec. 9(a).

[46]50 U.S.C. App., Sec. 5(b)(1)(B).

[47]*Silesian American Corp. et al. v. Markham*, 156 F. (2d) 793 (CCA 2d 1946); *Draeger Shipping Co. v. Crowley*, 55 F. Supp. 906 (1944).

Finanz-Korporation v. Markham[48], the Court of Appeals for the District of Columbia held that Section 5 (b) authorized seizure of property suspected of enemy taint, but that persons other than enemies or allies of enemies could recover their interests therein. Thus the court allowed a national of a foreign country to recover his property.

Before examining the Supreme Court cases on the subject, we wish to point out that the present case involves not a friendly alien, but a citizen of the United States. Now, with respect to friendly aliens, a business enterprise owned by them within the United States, and property controlled by that enterprise, may be vested by the custodian provided he finds that such vesting is in the national interest.[49] But in the case of a United States citizen, the custodian must have a very firm grasp on his own bootstraps in order to achieve a seizure such as we have here. First he must determine that the citizen is "purporting to act directly or indirectly for the benefit or on behalf of" a national of a foreign country.[50] But this determination would not suffice to authorize the seizure of a citizen's land, because the power with regard to a foreign national extends only to business enterprises, not to individuals.[51] So the custodian, in order to classify him as a national of a designated enemy country, all of whose property may be seized,

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[48]158 F. (2d) 313 (1946).

[49]Executive Order No. 9095, as amended, Sec. 2(b), 50 U.S.C. App. Sec. 6.

[50]Ibid., Sec. 10(a); see Executive Order No. 8389, as amended, Sec. 5 E(iii); 12 U.S.C. Sec. 95(a).

[51]Executive Order No. 9095, supra, Sec. 2(b).

must further determine either that he is controlled by or acting for an enemy, or that the national interest requires him to be treated as an enemy national.[52] It is clear then that the power to seize the property of a United States citizen stems from the same source as the power to seize the property of a foreign national, and is merely more attenuated. Therefore safeguards established by the Supreme Court with regard to the exercise of the power against friendly aliens would be *a fortiori* applicable to cases involving American citizens.

To resolve the conflict in lower court decisions, the Supreme Court granted certiorari in the *Uebersee* and *Silesian-American* cases.[53]

In the *Uebersee* case, the shares of stock in an American corporation held by a Swiss corporation (a friendly alien but a "national of a foreign country") were seized by the Alien Property Custodian. The Swiss corporation brought action to recover the shares under Section 9 (a) of the act alleging it was not an enemy or ally of an enemy and that the property was free from enemy taint. The custodian moved to dismiss on the ground that Section 5 (b) authorized the seizure so that the alien could not recover under Section 9 (a).

The Supreme Court recognized that Section 5 (b) must have some restrictive effect on rights under Section 9 (a) as they had theretofore existed. Under

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[52]Ibid., Sec. 10(a).

[53]*Uebersee Finanz-Korporation v. Clark*, 332 U. S. 480 (1947); *Silesian-American Corp. et al. v. Clark*, 332 U. S. 469 (1947).

Section 9 (a) friendly alien corporations whose stock was owned by an enemy could nevertheless recover their property.[54] The court held that the purposes of the 1941 amendment to Section 5 of the act would be frustrated were this interpretation to be continued. But, suggests the court, the right to sue contained in Section 9 (a) should not be read out of the law, since Section 7 (c) makes Section 9 (a) the only remedy available, and the denial of that remedy would probably be unconstitutional. To make the act harmonious with its amendments, therefore, the court determined to abandon the interpretation of the *Behn-Meyer* case, and to regard the definitions of "enemy" in Section 2 of the act as illustrative and not exclusive. The court indicated that it would hereafter define "enemy or ally of enemy" to include a neutral corporation, all or part of the stock of which is owned by an enemy.

How does this holding affect the present case? Appellant has proved that he has record title to the land in question and that it is not held for the benefit of his father. There is no evidence that Yotaro would ever get the land back, nor that the transfer was sham or colorable in any respect. But the trial court, finding that appellant is under the parental control of Yotaro, who could read him "out of the family and out of the corporation" (R. 58), holds that appellant is a national of a designated enemy country (Japan) not entitled to sue to recover his property. The Supreme Court has stated that the only persons whose

[54] *Behn, Meyer & Co. v. Miller*, 266 U. S. 457 (1925).

right to sue is proscribed are enemies or allies of enemies as that term is defined in Section 2 of the act. Assuming that the sort of control exercised by Yotaro over Kaname suffices to justify seizure, does it render Kaname an "enemy" within the meaning of Section 2? Section 2 (c), the only definition applicable, states that the term "enemy" includes—

> Such other individuals * * * as may be natives, citizens or subjects of any nation with which the United States is at war, *other than citizens of the United States* * * * as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy".[55] (Emphasis supplied.)

Unless the express prohibition against declaring American citizens to be enemies be read out of the act, appellant has every right to sue to recover his land. The approach of the Supreme Court in the *Uebersee* case demonstrates the grave antipathy of the court against reading out of the statute provisions which afford protection required by the Constitution. If then the gift to Kaname was a valid transfer (not merely sham or colorable) he has an interest in the property recoverable in this action, since he is not an enemy or ally of an enemy within the meaning of Section 9 (a). If Yotaro had complete control over the property (and the evidence does not show such control) then the transfer was probably colorable and Kaname would have no interest therein which he could claim. But if the control over the property is

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[55]50 U.S.C. App. Sec. 2(c).

anything less than complete dominion, then Kaname has an interest therein. And his interest would remain, even though he were subject to certain parental influences which indirectly affected his use of the property. Therefore, even though the seizure of the property were valid because of this limited control (which we deny) the sequestration of the property by the custodian has achieved the objectives for which the power was given him, and any further retention of the property against the legitimate demand of an American citizen is unlawful.

IV. A CONSTRUCTION OF THE TRADING WITH THE ENEMY ACT WHICH WOULD DENY APPELLANT THE RIGHT TO RECOVER HIS INTEREST IN THE PROPERTY IS UNCONSTITUTIONAL.

If appellant has an interest in this property, can he be precluded from suing for its recovery because, by virtue of parental control which his enemy father had over him, he has been denominated an enemy by the Alien Property Custodian? To so decide, the court would have to do considerable violence to the statute. And if the court so decides, it is our contention that the statute as construed would deprive appellant of his property without due process of law in violation of the Fifth Amendment.

Section 7(c) of the act establishes the remedy contained in Section 9(a) as the sole means of recovery of property seized under the act.[56] To deny appellant,

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[56] *Becker Co. v. Cummings*, 296 U. S. 74 (1935).

a United States citizen, this sole remedy is an unconstitutional confiscation. Justification might be found in the war power[57] whereby the United States may confiscate enemy property. Under this power the seizure of the property of friendly aliens is justified.[58] But the problem of remedy or compensation remains.[59] Granting that the seizure of property suspected of being of assistance to the enemy is proper, when that property belongs to an American citizen, the sequestration cannot amount to actual confiscation without remedy.[60] Nor can the *ex parte* determination by the custodian that the citizen of the United States is in effect a national of an enemy country convert him into an enemy whose property is subject to confiscation. If Yotaro controlled Kaname to such an extent that Kaname's behavior was disloyal to and a crime against the United States, then Kaname would be an enemy. Then his conduct would be giving aid and comfort to the enemies of the United States and he would be guilty of treason. But Kaname can be tried, convicted and punished for that offense only in an orderly way, with the government bearing a heavy burden of proof. And after conviction, his property can be taken only after imposition of sentence in accordance with criminal processes. If appellant is compelled to

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[57]Art. I, Sec. 8, cl. 11, United States Constitution.

[58]*Silesian-American Corp. v. Clark*, 332 U. S. 469 (1947).

[59]See *Uebersee Finanz-Korporation v. Markham*, 158 F. (2d) 313 (1946), aff'd 332 U. S. 480 (1947).

[60]See Stone, J. in *Becker Co. v. Cummings*, 296 U. S. 74, 79. "The seizure and detention which the statute commands and the denial of any remedy except that afforded by Section 9(a) would be doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it."

meet the burden of proving that he is not an enemy of the United States in this sense before he can regain his property, it is clear that he will have been deprived of his property without due process of law.

CONCLUSION.

Appellant Kaname Fujino has an interest in the land in question and, not being an enemy nor an ally of an enemy, but a loyal American citizen, he can as a matter of right sue to recover that interest. The court below was in error in finding that the transfer to him was void as against the custodian or colorable. The court also erred in holding that Yotaro Fujino controlled either appellant or the land within the meaning of the Trading With The Enemy Act as amended. The judgment of the court below should be reversed and the case remanded with directions to restore the property and accumulated proceeds to appellant herein.

Dated, Honolulu, Hawaii,
April 15, 1948.

Respectfully submitted,
J. GARNER ANTHONY,
WILLIAM F. QUINN,
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ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

Constitution of the United States

Amendments

Article V

No person shall be * * * deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Statutory Provisions

Trading With The Enemy Act, c. 106, 40 Stat. 411, as amended (50 U.S.C. App. 1-31):

The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

* * * * * * *

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy".

The words, "ally of enemy", as used herein, shall be deemed to mean—

* * * * * * *

(c) Such other individuals, or body, or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy".

Sec. 5 (as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5(b)):

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or ear-marking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in

which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

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Sec. 7 (as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020):

* * * * * * *

(c) If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy * * * which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over

to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * * * *

Sec. 9 (as amended):

(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled:

Provided, That no such order by the President shall bar any person from the prosecution of any suit at

law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shal be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be en-

tered against the claimant or suit otherwise terminated.

Executive Order No. 9095 (as amended):

* * * * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * * * *

(c) any other property within the United States owned or controlled by a designated enemy country or national thereof, not including in such other property, however, cash bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof:

10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy Japan, Bulgaria, Hungary and Rumania) and any other country with which the

United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however,* that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading With The Enemy Act, as amended.

Executive Order No. 8389 (as amended):

* * * * * * *

Section 5.

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E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

In any case in which by virtue of the foregoing definition a person is a national of more than one foreign country, such person shall be deemed to be a national of each such foreign country. In any case in which the combined interests of two or more foreign countries designated in this Order and/or nationals thereof are sufficient in the aggregate to constitute, within the meaning of the foregoing control or 25 per centum or more of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of a partnership, association, corporation or other

organization, but such control or a substantial part of such stock, shares, bonds, debentures, notes, drafts, or other securities or obligations is not held by any one such foreign country and/or national thereof, such partnership, association, corporation or other organization shall be deemed to be a national of each of such foreign countries. The Secretary of the Treasury shall have full power to determine that any person is or shall be deemed to be a "national" within the meaning of this definition, and the foreign country of which such person is or shall be deemed to be a national. Without limitation of the foregoing, the term "national" shall also include any other person who is determined by the Secretary of the Treasury to be, or to have been, since such effective date, acting or purporting to act directly or indirectly for the benefit or under the direction of a foreign country designated in this Order or national thereof, as herein defined.

Hawaiian recording act (Revised Laws of Hawaii, 1945).

Sec. 12757. Powers of attorney, etc. All indentures of apprenticeship, articles of marriage settlement and powers of attorney for the transfer of real property within the Territory shall be recorded in the bureau of conveyances, in default of which no such instrument shall be binding to the detriment of third parties and conclusive upon their rights and interests.